

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CITY OF CINCINNATI *ex rel.*
THOMAS E. BRINKMAN, JR.,

Relator,

v.

CITY OF CINCINNATI, *et al.*,

Respondents.

Case No. A 1 9 0 3 7 7 9

Judge _____

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CLERK OF COURTS
HAMILTON COUNTY

AUG 13 2019

MOTION FOR ISSUANCE
OF INJUNCTION PURSUANT
TO R.C. 733.56

AFTAB PUREVAL
COMMON PLEAS COURTS

Now comes the CITY OF CINCINNATI, by and through Relator THOMAS E. BRINKMAN, JR., as a taxpayer and resident of the CITY OF CINCINNATI, and hereby moves, pursuant Ohio Rev. Code § 733.56, for the immediate issuance of an injunction to restrain and estop the abuse of corporate powers by and in the name of the CITY OF CINCINNATI. Specifically, injunctive relief is need and statutorily mandated in order to restrain the abuse of corporate powers by PAULA BOGGS MUETHING, in her capacity as the Cincinnati City Solicitor, whereby she authorized the filing and prosecution of a lawsuit on behalf of and in the name of the CITY OF CINCINNATI and currently pending in the Hamilton County Common Pleas Court, styled *City of Cincinnati v. State of Ohio*, with Case No. A-19-02786 (the "*RC 9.68 Lawsuit*"), when the filing of such lawsuit on behalf of the municipal corporation was not authorized by the Cincinnati City Council.

Ohio Rev. Code § 733.56 provides, in pertinent part, that:

[a] city director of law shall apply, in the name of the municipal corporation, to a court of competent jurisdiction for an order of injunction to restrain...the abuse of [the] corporate powers [of the municipality].

“All the cases construing this section hold that it is remedial in its nature, and should be given a liberal construction.” *City of Wilmington v. Buckley*, 86 Ohio App. 117, 118, 90 N.E.2d 174 (1st Dist. 1949).

Just as “any unlawful exercise of power by [a] [city] council, or the assuming of power by [a] [city] council which is not conferred by the constitution or the statutes, is an abuse of corporate power,” *Village of Warrensville Heights v. Cleveland Raceways*, 116 N.E.2d 837, 838 (8th Dist. 1954), so too is the assumption of power and authority by an officer or official of a municipality when such power or authority is not vested in such officer or official. Thus, “[t]he abuse of corporate powers, within the purview of [Ohio Rev. Code § 733.56], includes the unlawful exercise of powers possessed by the corporation, as well as the assumption of power not conferred.” *Elyria Gas & Water Co. v. City of Elyria*, 57 Ohio St. 374, 375, 49 N.E. 335 (1898).

In the case *sub judice*, Respondent PAULA BOGGS MUETHING, in her capacity as Cincinnati City Solicitor, has sought to assume and exercise a power of the CITY OF CINCINNATI *qua* a municipal corporation beyond that authorized by law. Specifically, on June 6, 2019, the CITY OF CINCINNATI, at the behest of PAULA BOGGS MUETHING as Cincinnati City Solicitor, filed a lawsuit against the State of Ohio, in the Hamilton County Common Pleas Court, in a case styled *City of Cincinnati v. State of Ohio*, and assigned Case No. A-19-02786 (referred to herein as the “RC 9.68 Lawsuit”). *Verified Complaint* ¶20. At no time has the Cincinnati City Council authorized or directed PAULA BOGGS MUETHING as the Cincinnati City Solicitor to file the RC 9.68 Lawsuit by and in the name of the CITY OF CINCINNATI or as an official-capacity lawsuit by and in the name of a official with the CITY OF CINCINNATI. *Verified Complaint* ¶22.

As a municipal corporation, the CITY OF CINCINNATI is a body politic and corporate, capable of suing and being sued. Ohio Rev. Code § 715.01. And Ohio Rev. Code § 715.03 expressly provides that

All municipal corporations have the general powers mentioned in sections 715.01 to 715.67, inclusive, of the Revised Code, and *the legislative authority of such municipal corporations may provide by ordinance or resolution for the exercise and enforcement of such powers.*

Ohio Rev. Code § 715.03 (emphasis added). Thus, under state law, the authority to sue on behalf of a municipal corporation must be given by ordinance or resolution of the legislative authority; in the case *sub judice*, by the Cincinnati City Council.

While Article IV, Section 5 of the Cincinnati City Charter provides that the Cincinnati City Solicitor “shall represent the city in all proceedings in court”, said responsibility does not grant *carte blanche* power and authority to the Cincinnati City Solicitor to commence legal proceedings in any court on behalf. Instead, such provision simply imposed and defines a duty of the Cincinnati City Solicitor; it does not delegate the clear legislative prerogative to actually authorize the initiation of a lawsuit on behalf of and in the name of the CITY OF CINCINNATI.

Furthermore, the authority to exercise the corporate power to sue is inherent in the legislative branch, *i.e.*, the Cincinnati City Council, which may provide, by ordinance or resolution, the authority for an executive branch officer to direct or authorize the bringing of an action on behalf of the corporation. *See Cincinnati City Charter, Article II, Section 1* (“[a]ll legislative powers of the city shall be vested, subject to the terms of this charter and of the constitution of the state of Ohio, in the council”). And, in fact, there are numerous instances where the Cincinnati City Council expressly authorized the Cincinnati City Solicitor to bring actions on behalf of and in the name of the CITY OF CINCINNATI. *Verified Complaint, Exhibit C.* The *RC 9.68 Lawsuit* is not one of those instances.

In responding to the *Taxpayer Demand Letter* tendered by THOMAS BRINKMAN pursuant to Ohio Rev. Code § 733.59, *i.e.*, in the *Response Letter*, PAULA BOGGS MUETHING cited to the authority given to her in Article III, Section 2 of the Cincinnati Administrative Code:

The city solicitor shall be the legal advisory of the city government and all its agencies, and shall represent the city as attorney and counsel in all judicial proceedings in which the city is a party before any court or governmental commission having judicial power, and as such attorney may settle or compromise claims or suits at law or in equity to which the city may be a party, either by judgment entry or otherwise.

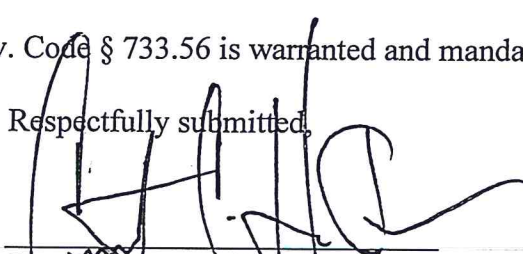
Verified Complaint, Exhibit E. She then proceeded to declare that “[t]his mean that City Council recognizes that the City Solicitor has the power to initiate, dismiss, or settle litigation on behalf of the City of Cincinnati.” *Verified Complaint, Exhibit E.* In making such a declaration, though, PAUL BOGGS MUETHING has impermissibly added language to the Cincinnati Administrative Code so as to assume a power not granted to her. While Article III, Section 2 of the Cincinnati Administrative Code does empower the Cincinnati City Solicitor to “settle or compromise” lawsuits, nothing with the Cincinnati Administrative Code grants her *carte blanche* authority to initiate lawsuits; this is a distinction with a significant difference.

Finally, as PAULA BOGGS MUETHING noted in the *Response Letter*, Article II, Section 1 of the Cincinnati City Charter declares that “[t]he laws of the state of Ohio not inconsistent with this charter...shall have the force and effect of ordinance of the city of Cincinnati....” The Cincinnati City Charter does not address directly the authority to initiate lawsuit by and in the name of the CITY OF CINCINNATI; thus, state law, *i.e.*, Ohio Rev. Code § 715.03, controls. And while the Cincinnati City Council has exercised its prerogative in certain specific instances, *i.e.*, as set forth in *Exhibit C to the Verified Complaint*, the Cincinnati City Council has not authorized the filing of the *RC 9.68 Lawsuit*. Thus, in authorizing the filing and

continuing to prosecute the *RC 9.68 Lawsuit*, PAULA BOGGS MUETHING, in her capacity as Cincinnati City Solicitor, has abused the corporate powers and, pursuant to Ohio Rev. Code § 733.56, an injunction shall issue to retain such abuse.

As an abuse of corporate powers of the CITY OF CINCINNATI exists and continues to occur, the issuance of an "order of injunction to restrain...the abuse of [the] corporate powers [of the municipality]" pursuant to Ohio Rev. Code § 733.56 is warranted and mandated

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was or will be served upon the following on the 13th day of August 2019, via e-mail:

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